In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 868

JAMY CORPORATION, PETITIONER

v.

ROBERT A. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion. Its findings of fact, conclusions of law, and order (Pet. App. 15–16) are unreported. The opinion of the court of appeals (Pet. App. 17–20) is reported at 337 F. 2d 11.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21) was entered on September 23, 1964. A timely petition for rehearing was denied on November 5, 1964. (R. 93.)[1] The petition for a writ of certiorari

[1] "R." references are to Volume One of the record on appeal.

was filed on February 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 6871 of the Internal Revenue Code of 1954 authorizes the assessment and collection of income taxes without the prior issuance of a deficiency notice, where the taxes were assessed while the taxpayer was in receivership.

STATUTES AND REGULATIONS INVOLVED

Sections 6212(a), 6213(a), 6871, 6873(a), 7421(a) of the 1954 Code, and Sections 301.6871(a)–1 and 2, and 301.6873–1 of the Treasury Regulations on Procedure and Administration (1954 Code) are set forth in the Appendix to the petition.

STATEMENT

The taxpayer filed federal income tax returns for its fiscal years 1956 and 1957 and paid the tax shown to be due. (R. 3.) At the time, Amy S. McKinnon and James A. McKinnon, each of whom owned 50% of the stock in the taxpayer-corporation, were husband and wife but they had separated and were engaged in divorce proceedings. (R. 3.) In 1959, the wife instituted an action in the California Superior Court for dissolution of the taxpayer-corporation on the ground that the dissidence of the two equal stockholders made it impossible properly to conduct the corporate business. A receiver was appointed. (R. 3; Pet. App. 15.) Thereafter, the District Director, acting pursuant to the provisions of

Section 6871 of the 1954 Code, made deficiency assessments against the taxpayer-corporation for the fiscal years 1956 and 1957 in the respective amounts of $4,026.24 and $4,962.08 and sent written notice thereof to the receiver. (R. 3–4, 10–12, 89; Pet. App. 15.) Subsequently, on January 22, 1960, the District Director filed a claim for these taxes in the State court receivership. The validity of this claim was never adjudicated in that proceeding, although the receiver appears to have tacitly recognized its validity. (R. 5, 89.)

The receivership was not completed and the corporation was not dissolved. The husband and wife adjusted their business differences, filed a stipulation for termination of the receivership, which was approved on May 2, 1962, and the assets of the corporation were returned to it. (R. 5, 89.)

Subsequently, the District Director advised the taxpayer that he intended to enforce the tax assessments made while the corporation was in receivership, and in October and November, 1962, made demand for payment of the taxes assessed. (R. 6–7, 14, 89.) Thereupon, the taxpayer-corporation filed a complaint for an injunction to restrain the Director from enforcing collection of the taxes. (R. 2–9, 89.)

The district court concluded that the assessments were valid, dismissed the complaint for lack of jurisdiction, and denied taxpayer's motion for an injunction *pendente lite*. (R. 47.) The Court of Appeals affirmed. (R. 92.)

ARGUMENT

The decision of the court below is correct. There is no conflict of decisions and no reason warranting review by this Court.

The asserted basis of the injunction suit is that since the claim for taxes was not approved and allowed in the receivership, the taxes may not be collected through distraint without first issing a deficiency notice, as provided in Sections 6212(a) and 6213(a) of the 1954 Code (R. 5–6). The contention is without merit.

Section 6871, pursuant to which the income taxes here involved were assessed, provides that where a receivership proceeding is instituted in any federal or State court and a receiver appointed, any deficiency in tax determined to be due "shall * * * be immediately assessed," "despite the restrictions imposed by Section 6213(a)." See also Section 301.6871(a)–1(a), Treasury Regulations on Procedure and Administration. Thereafter, as Section 6871(b) provides, no petition for redetermination of the deficiency may be filed with the Tax Court. See also Section 301.6871(a)–2(c) of the Treasury Regulations; H. Rep. No. 704, 73d Cong., 2d Sess., p. 34.

A claim for the deficiency in tax assessed may be presented for adjudication to the receivership court.[2]

[2] At the time proof of claim is filed with a bankruptcy or receivership court, the District Director is required to send notice and demand for payment to the taxpayer, together with a copy of such proof of claim. Treasury Regulations, Section 301.6871(a)–2(b).

See *Abel* v. *Campbell*, 334 F. 2d 339 (C.A. 5th); *Cohen* v. *Gross*, 316 F. 2d 521 (C.A. 3d). If the claim is "allowed," Sec. 6873 becomes applicable to require the taxpayer to pay any portion of the tax which was not collected from the receivership assets. Alternatively, if the government is willing to forego an attempt to collect its claim from the assets held by the bankruptcy or receivership court, it may simply collect on the assessment, using the ordinary equitable and legal remedies which are made available to it by statute. See Section 6331 and Section 301.6873-1(b); cf. *Bruning* v. *United States*, 376 U.S. 358, 360–361.

Clearly the situation here involved, where adjudication and allowance of the tax claim in the receivership proceeding was thwarted by taxpayer's own action in causing the proceeding to be terminated, presents a particularly appropriate occasion for the latter approach of collecting on the assessment by enforcement of the lien by suit or by distraint proceedings. See *Kornberg* v. *Tomlinson*, 225 F. Supp. 70 (S.D. Fla.), affirmed *per curiam* on February 18, 1965 (C.A. 5th, No. 21485).

Finally, it is worth noting that injunctive relief is unwarranted here as a matter of equity alone, for the taxpayer has an adequate remedy at law. It can pay the tax, file a refund claim and sue for recovery if the claim is denied. That it is in a position to do so is apparent from its allegations (R. 7, 8) that it has "ample cash" and is "financially solvent."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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